SUPREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1493

ALICE LOVE, et al.,

Petitioners,

vs.

DADE COUNTY SCHOOL BOARD, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled cause on February 28, 1975.

OPINIONS BELOW

The opinions of the Courts below directly preceeding this petition are as follows:

1. The District Court order of July 30, 1974 is unreported and is printed in the Appendix hereto.

2. The District Court order of August 6, 1974 is unreported and is printed in the Appendix hereto.

3. The Court of Appeals order of February 28, 1975 is unreported and is printed in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on February 28, 1975. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

I.

WHETHER THE COURT BELOW ERRED IN UPHOLDING THE ESTABLISHMENT OF A RESEGREGATIVE SIX-SCHOOL-KINDERGARTEN-THROUGH-TWELFTH - G R A D E ALL-BLACK FEEDER PLAN.

II.

WHETHER THE COURT BELOW ERRED IN PREMATURELY UPHOLDING REJECTION OF CONSIDERATION OF A COMPREHENSIVE DESEGREGATION PLAN FOR THE 1975-1976 SCHOOL YEAR IN VIEW OF THIS FEEDER PLAN AND THE DISTRICT COURT'S ORDER GRANTING AN EVIDENTIARY HEARING ON THE CONSTRUCTION PLAN.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

1. INTRODUCTION

This Dade County, Florida public school desegregation case was initiated in 1969 and has been pending in the courts ever since.[1] The Plaintiff, Pate, is no longer involved, Defendant remains the Dade County School Board, and Intervenors, Alice Love, et al. (Appellants below) are the Petitioners to this Court.

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[1]Pate v. Dade County School Board, 434 F.2d 1151 (5th Cir. 1970), cert. den. 402 U.S. 953 (1971); 447 F.2d 150 (5th Cir. 1971), cert. den. 405 U.S. 1064 (1972); see Appendix hereto for unreported orders and opinions below (1974). Earlier proceedings include reported opinions at 303 F.Supp. 1068 (S.D.Fla. 1969), 307 F.Supp. 1288 (S.D.Fla. 1969), 315 F.Supp. 1161 (S.D.Fla. 1970). Some opinions appear sub nom Love v. Dade County School Board.

The two most significant decisions *before* the 1974 immediate proceedings below may be summarized briefly.

On August 12, 1970, the Court of Appeals' controlling opinion in the case at bar ordered various specific modifications of the District-Court-approved-School Board plan (as first modified by the District Court) in order to "effectively desegregate the Dade County School System" (434 F.2d 1151), and this Court denied the School Board's Petition for Certiorari (402 U.S. 953).

On June 14, 1971, the District Court entered an Order finding the Dade County's dual school system disestablished in accordance with such opinion, and retaining jurisdiction to assure its continual maintenance in a unitary manner. (R. 1-4)[2]

During the rest of 1971, 1972 and 1973, Intervenors were unsuccessful in their Court-objections to the School Board's Feeder Plans (Pupil Assignment plans) but Intervenors did help prevent regression. Thus the School Board did abandon a particularly discriminatory and resegregative proposed Feeder Plan in response to Intervenors' Motion for Hearings on said Plan as well as a previously-rejected 15-40%-black total desegregation plan (the Motion was denied as moot by the District Court on March 22, 1973, R. 76).

The School Board, however, has succeeded in going backwards in 1974 despite Intervenors' efforts to date.

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[2]"R" refers to the Record on Appeal in the Court of Appeals below. Pertinent citations are included herein for possible use by the parties or this Court if and when the Record below is certified.

2. THE PROCEEDINGS BELOW

Turning now to the immediate proceedings giving rise to this Petition, in the spring of 1974 the School Board adopted a Feeder Plan and Construction Plan for the 1974-1975 school year. Intervenors deemed the Plan resegregative, discriminatory and unconstitutional: the Feeder Plan (similar to the one abandoned in 1973) establishes a six-school-K-12-all-black inner-city feeder system (many of said schools' students having attended desegregated schools the prior year) *inter alia;* the Construction Plan, for example, includes several new schools to be built in almost-all-white areas while excluding needed construction in primarily-black-and-Cuban-areas as well as construction in areas where desegregated schools would be feasible and practical.

In accordance with the District Court's express retention of jurisdiction "to assure that the school system does not revert to a state-imposed dual school system", on June 20, 1974, Intervenors filed in the District Court their 29 page "Petition for Supplemental Relief to Maintain Unitary School System Insofar As It Has Been Established To Date By Court Order And To Disestablish Dual School System Insofar As It Now Exists By Enjoining Further Implementation of 'Feeder Plan' And 'New Construction Plan' As Well As Requiring Adoption of Appropriate New Desegregation Plan" (R. 70-98). This Supplemental Petition challenged both the 1974 Feeder Plan and Construction Plan adopted by the School Board as (1) violative of the Orders of the Court of Appeals, as well as the District Court below and (2) intentionally segregative actions now rendering the Dade County School system a dual system. The Petition asserted the need for a com-

prehensive desegregation plan and stated Intervenors' retention of Dr. John A. Finger, Jr. to prepare such a plan for the District Court's later consideration for the 1975-1976 school year.

Relief sought in the Supplemental Petition included (1) full discovery and evidentiary hearings to develop a full record, (2) an injunction against further implementation of the Feeder Plan and the Construction Plan, and (3) subsequent adoption of a full desegregation plan.

Following the School Board's Motion to Dismiss and Response, Intervenors' Reply, etc., and a hearing limited to arguments of counsel (R. 270, 301, 317, 328, 329, 345, 361), the District Court *denied* the Supplemental Petition with respect to enjoining the 1974 Board-adopted Feeder Plan and with respect to consideration of Intervenors' proposed 1975-1976 comprehensive desegregation plan(s) on the ground that there was no "prima facie showing" of the School Board's failure to assure no reversion to a dual school system; the District Court *granted* the Supplemental Petition with respect to the Construction Plan to the extent of scheduling an evidentiary hearing thereon (said hearing is to be held sometime in the future after completion of all Court proceedings on the denied relief, R. 355, 360; Appendix *infra*).

The Court of Appeals affirmed the District Court's decision upholding the Feeder Plan and rejecting any 1975-1976 comprehensive desegregation plan (Appendix *infra*). (The Construction Plan presented no issue on appeal as the School Board did not cross-appeal the District Court's granting of an evidentiary hearing thereon at some as yet undetermined date).

The within Petition for Certiorari seeks review by this Court of said affirmance below.

3. THE "FACTS" IN SUPPORT OF THE SUPPLEMENTAL PETITION

Since to date no evidential hearing has been allowed on Intervenors' Supplemental Petition, the supporting "facts" before the Court below (and this Court should certiorari be granted), consist of said Supplemental Petition and Exhibits attached thereto (Feeder Plan, Exhibit A; Construction Plan, Exhibit B; photographic reproductions about 3 feet by 5 feet, of the School Board Offices' 3 maps locating all Elementary, Junior High and Senior High Schools, Exhibit C; Dr. John A. Finger, Jr.'s Preliminary Report, Exhibit D), Intervenors' Reply (Curriculum Vitae of Dr. Finger, Exhibit E), and Intervenors' letter-reply concerning Construction. (R. 99, 151, 262, 265).

A. 1974 FEEDER PLAN

The School Board's failure to pass a similar plan the year before, in view of the District Court's Biracial/Tri-Ethnic Committees' negative report and Intervenors' prior Court-objections thereto, is set forth in the Supplemental Petition along with the School Board's adoption of the 1974 Feeder Plan over objections of two School Board members and of the District Court's Committee that insufficient time to study the Plan was allowed. (R. 70 et. seq.) The Supplemental Petition challenges three portions of the Feeder Plan, the chief objection being on p. 9 (R. 78):

"The most objectionable feature of the Feeder Plan is the establishment of a six-all-black elementary-through-Senior-High-School feeder system under which four elementary schools, *Olinda, Orchard Villa, Drew* and *Holmes*, feed *Drew Middle School* which feeds *Miami Northwestern Senior High;* the attendance zone for the elementary schools, Junior and Senior High Schools are 'congruent' (See Feeder Plan, North Central Area, pp. 18-19). Thus, any kindergarten-age child living within this attendance zone is guaranteed an all-black public school education for the next thirteen years, i.e., is sentenced to segregated public schools for the rest of his childhood."

Intervenors' Reply (R. 329) states as follows: ". . . Defendant attempts to blunt the obvious resegregation of the proposed Feeder system by pointing to the elimination of Dorsey [Junior High] and then attaches an exhibit [Exhibit I, Motion to Dismiss . . .] showing almost half of the present feeders were *non*-Dorsey feeders. It tries to pass off the 3,610 blacks[1] who will attend K-12 in totally black schools as not a whit different from the present situation where some of them at least go to white schools part of their school lives and the remainder share with their classmates, who at some point attended desegregated schools, the experiences of non-segregated education."

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[1]School Board Report dated April 1, 1974, pp. 10-12, gives Drew, Holmes, Olinda, Orchard Villa Elementary School number of students as 824, 740, 774 and 1272 (for a total of 3610).

Intervenors' Supplemental Petition, p. 12, noted the Bi-Racial Committee's March 8, 1974 Report to the District Court specifically objecting to "locking in a six-school, all-black Northwestern feeder system"; the Committee's opinion is that Northwestern can be maintained "as a first-class high school" without "the unsound feeder patterns that now exist if some reasonable and practicable transportation is considered as a desegregation tool (a position fully supported by *Swann*)."

B. 1974 CONSTRUCTION PLAN

While Intervenors are obviously not asking this Court to review that portion of the District Court's order *granting* an evidentiary hearing on the 1974 New Construction Plan, brief note of the supporting facts presented below is indicated because such constitute part of the deliberate resegregation and Constitutional violation urged by Intervenors as a basis for the relief requested and especially for later consideration of a 1975-1976 comprehensive desegregation plan (relief denied by the courts below).

Intervenors' Supplemental Petition (R. 83) challenged *inter alia*, four new high schools to be built in the suburbs to serve mostly white students and *no* new downtown Miami High School (suggested by the State Board of Education) to serve Black and Latin students as well as relieving overcrowding at predominantly black Miami Jackson and predominantly Cuban Miami High School.

Intervenors' Reply (R. 321) refers to the Biracial/Tri-Ethnic Committee's May 24, 1974 Report to the District Court stating that three proposed new elementary and secondary school sites will be in virtually all-white

areas and recommending their construction *only if* attendance plans, etc. would render such schools "nonracially identifiable" and *only if* "any transportation involved would be two-way with all racial and ethnic groups sharing an equitable responsibility" (Intervenors' evidence not indicating the School Board's compliance with the conditions).

Intervenors' July 16, 1974 letter-reply sent to the District Court contends that the Palmetto/South Dade relief school (R. 346), the Miami Edison replacement school (R. 346), the Miami Carol City/Hialeah-Miami Lakes relief school (R. 347), and the Miami Killian/Southwest relief school (R. 347) will be virtually all-white but for the Edison replacement which "amounts to affirmative resegregative action because the Board is aiding the fastest tipping Senior High in the Dade County system to continue becoming all-black (rather than moving the attendance zone northward to add white students or taking similar steps)."

Perhaps most revealing is the Construction Plan's "seed grant" of $25,000 (with $500,000 later sought) to all-black Miami Northwestern Senior High to develop the concept of turning said school into some kind of Center for Performing and Visual Arts *in order to attract white students.* While such a Center offers valuable training and skills, as stated in the Supplementary Petition (R. 83-84), "Singing and dancing are no substitute for desegregation." Intervenors' Reply (R. 322) contains the following:

> ". . . [*Brown I* holds] to the effect that reading, 'riting and 'rithmetic are no *substitute* for de-

segregation either. Quality education includes Constitutional desegregation as well as proper curriculum."

C. DUAL SYSTEM

Intervenors' Supplemental Petition (R. 70) sets forth various factual material concerning the dual school system now existing in Dade County in view of the failure of the 1970 Court-Ordered plan and in view of School Board discriminatory action and inaction. A specific statistical comparison of the expected racial composition of numerous paired and grouped schools named in the Court of Appeals' 1970 opinion (434 F.2d 1151) and their actual racial composition as of February 12, 1974 is made (Appendix, *infra*), demonstrating that the "Court's plan has not worked realistically and indeed in view of School Board inaction and action, is now hardly working at all" (R. 84). Additional statistics are set forth demonstrating that Dade County not only ranks at or near bottom of desegregation achievement by Florida large-city school-districts (and is today far behind what many other Florida counties achieved three years ago) but also has *increased* the percentage of black students in 100% all-black schools from 12.9% in 1971 to 15.7% in 1974.[4] (R. 88, 89). The School Board's consistent placement of the burden of desegregation on the black community and disregard of the Court of Appeals' direction not to "diminish the degree of desegregation", the District Court's warnings that such was occurring, and the Biracial/Tri-Ethnic Committee's similar conclusions, is also set forth in some detail (R. 89-93).

[4]The School Board's Exhibit IV, attached to its Motion to Dismiss, shows an increase of 1,663 more black students in 100% black schools in 1973 compared to 1972.

D. COMPREHENSIVE DESEGREGATION PLAN FOR THE 1975-1976 SCHOOL YEAR

Intervenors attempted to assist both the District Court below and the School Board by retaining Dr. John A. Finger, Jr., to prepare a desegregation plan "which will eliminate existing segregation and/or resegregation without unnecessary extensive busing", and also to prepare a second plan "using such maximum guidelines for number of students, numbers of miles or numbers of minutes for busing as this (District) Court may set". (Supplemental Petition, R. 93-94; Intervenors' Reply, R. 320).

Dr. Finger (whose impressive Curriculum Vitae is attached to Intervenors' Reply as Exhibit E), after reviewing and analyzing the various relevant materials concerning the Dade County School System, concluded in his Preliminary Report that (1) the Feeder Plan and Construction Plan perpetuates segregation rather than effectuating desegregation, (2) "parts of Dade County . . . can be desegregated without long distance pairing of schools", (3) "[w]hile it *may* prove impossible to desegregate each and every school in Dade County without extensive busing the possibility of doing so should not be discarded without extensive study and analysis", and (4) he would like to prepare a feasible total desegregation plan for Dade County, the sixth largest school district in the nation, for presentation to the District Court "for consideration for the 1975-1976 school year". (R. 265-269)

Although the 1974 Feeder and Construction Plans were challenged below specifically, both involve subsequent school years in practice and as adopted.

REASONS FOR GRANTING THE WRIT

1. *The six-school-kindergarten-through-twelfth-grade Feeder Plan recreates a dual school system in Dade County* by guaranteeing a permanent all-black segregated school system for over three thousand inner-city children divided by skin color from the remaining school system. The School Board has breathed new life into "separate but equal" by allegations of "separate but quality education" or "separate but stabilized". Regardless of the slogan or obfuscation by pedagogic jabberwocky, the establishment or reestablishment of a dual school system (with identifiable separatism based on color) is in violation of *Brown v. Board of Education*, 347 U.S. 483 (1954), *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968) and *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). *Swann* specifically prohibits reversion of a "unitary" school system to a state-imposed dual school system.

Certainly twenty-one years should be sufficient maturation period for the concept that educating culturally, economically, and politically deprived inner-city children in a school system that exemplifies a philosophy that "Blacks should be separated from Whites" is constitutionally impermissible, *Brown v. Board of Education, supra.*

When the Court of Appeals initially in 1970 found no "feasible method of desegregating" all-black Drew Junior High School or all-black Miami Northwestern High School on the record then before it, the Court explicitly noted that many of Drew's "students will have attended elementary schools which are desegregated under the modifications heretofore set forth" and that many of Miami

Northwestern's "students will have attended either a desegregated elementary or junior high school" (434 F.2d 1151 at 1157, 1158). Moreover, the Dade County School Board's 1974 Feeder Plan (p. 18) states that Drew Junior High School area students have been assigned to "predominantly white Fisher Junior High during the past several years" and that the closing of all-black Dorsey Junior High resulted in assigning its students to various junior high schools within the county. Many inner-city "post-Dorsey" students then attended predominantly white junior high schools.

There is a crucial difference between the 3,610 black students (School Board Report April 1, 1974 number of students in Drew, Holmes, Olinda and Orchard Elementary Schools) who will attend[5] K-12 in totally black schools under the Feeder Plan challenged herein and the prior situation in which at least some of these students go to white schools part of their school lives and the remainder at least share second-hand (through their classmates who at some point attended desegregated schools) the experiences of desegregated education.

The School Board's stated purpose (Feeder Plan, p. 18) is "to provide the elementary school students residing in this [North Central inner-city] area an opportunity to continue their education with their classmates in junior and senior high school . . ." Obviously the School Board, which is allegedly stabilizing attendance in the inner-city area, is really engaging in deliberate re-segregation. But

[5]This Petition is based on the arguments presented below, although the 1974 Feeder Plan sought to be enjoined by Intervenors is actually in effect now; obviously injunctive relief would apply for the coming 1975-1976 and subsequent school years.

stability does not necessitate discriminatory action: the District Court's Biracial/Tri-Ethnic Committee's March 8, 1974 report to the District Court specifically objected to "locking in a six-school, all-black Northwestern feeder system" and gave the Committee's opinion that Northwestern can be maintained "as a first-class high school" without unstable feeder patterns "if some reasonable and practicable transportation is considered as a desegregation tool . . ."

Moreover, the Feeder Plan challenged herein establishes an inner-city all-black six-school K-12 system while, simultaneously, transporting other black elementary school graduates from the same North Central inner-city area to predominantly white junior and senior high schools which are at least six and as much as twelve miles away; the Feeder Plan also, simultaneously, transports zero white elementary school graduates similar distances to all-black Drew and Miami Northwestern secondary schools.

Achieving stability by adopting a "neighborhood school policy" which resegregates inner-city students is constitutionally invalid under this Court's decisions noted above.

When the duty of conversion "to a unitary system in which racial discrimination would be eliminated root and branch" includes the direction that "whatever plan is adopted will require evaluation in practice" by the District Court, *Green v. County School Board of New Kent County*, *supra*, at 438-440, and practice demonstrates not only partial failure of the 1970 Court-ordered plan but also an intentional resegregative 1974 Feeder Plan, then injunctive and other relief is indicated.

It is clear that the twenty-year-old lessons that "separate but equal" is unconstitutional need relearning by the School Board. The inherent inequality of any separate educational system is not made any less unconstitutional by clouding the issue with new slogans such as "separate but stabilized" or even "separate but better".

2. The premature rejection of consideration of Intervenors' proposed comprehensive desegregation plan(s)[6] for the 1975-1976 (or, *a fortiori*, subsequent) school year conflicts with standards set forth by this Court in *Keyes v. School District No. 1*, 413 U.S. 189 (1973) and *Milliken v. Bradley*, 418 U.S. 717 (1974) concerning appropriate remedies for constitutional violations in school desegregation cases. Even apart from the question of the validity of the inner-city-six-all-black-K-12-school Feeder system raised immediately prior hereto, the District Court's granting of an evidentiary hearing concerning the 1974 Construction Plan precludes such rejection at this posture of the case.

The School Board did not choose to cross-appeal from the District Court's Order setting an evidentiary hearing on the Construction Plan, the Construction Plan was explicitly not considered by the Court of Appeals below, and the evidentiary hearing is scheduled to be held sometime in the future, after final disposition of Intervenors' contentions concerning the Feeder Plan by this Court (Appendix *infra*).

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[6]Contrary to the School Board's fallacious assertions in the Courts below, Intervenors do not now and never have sought fixed racial quotas but instead seek desegregated Dade County schools in which each student body black-white composition is substantially proportionate to the whole system's composition, i.e., with no more than a 10% deviation above or below, for a maximum 20% deviation (see Intervenors' Memorandum of Law to the District Court dated June 3, 1970 and subsequent briefs, oral arguments, etc.). Moreover, Intervenors seek as much desegregation as required by existing law, even if such be less than Intervenors desire.

Intervenors' Supplemental Petition and Reply state their retention of Dr. John A. Finger, the School Plan expert of *Keyes* and *Swann*, *supra*, to prepare a total desegregation plan as well as a second plan using such time/distance guidelines as the District Court below may set. Dr. Finger's "Preliminary Report" (attached to Intervenors' Supplemental Petition as Exhibit D) concludes that he would like to prepare a feasible desegregation plan for Dade County for later presentation to the District Court. Such proposed plan(s) may offer not only feasible desegregation improvements but also more stability and quality education than the School Board presumably desires. Such plan(s) should not now be rejected, unformulated, unformulatable, and sight unseen.

This Court's majority opinion in *Milliken v. Bradley*, *supra*, cogently stated the underlying issue:

> "The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. *Swann*, *supra*, at 16."

Even if the 1974 Feeder Plan is valid, Intervenors' position to the contrary notwithstanding, how can the scope of the remedy be determined and/or any remedy rejected at this posture of the Dade County, Florida school desegregation case when the District Court's July 30, 1974 Order (Appendix, *infra*) indicates that Intervenors demonstrated a prima facie showing of the School-Board-adopted Construction Plan's dismantling of the "unitary" system and an as-yet unscheduled hearing is to be held on the Construction Plan?

No question of a multi-district remedy for single-district *de jure* violations is presented in this case since Metropolitan Dade County *is* a single district with one School Board having responsibility for all public schools in the co-extensive Greater Miami area. Whatever problems arise in Atlanta, Wilmington, Detroit, Louisville, Boston, etc. with respect to scope of remedy are totally different from the situation in Dade County because a full desegregation plan for its approximately one-quarter-black, three-quarter-white public school student body in no way necessitates any involvement by other school districts.

As far as the question of whether "a separate, identifiable, and unrelated section of the school district that should be treated as isolated from the rest of the district" is concerned, *Keyes* case, *supra*, 37 L.Ed.2d at 566, it seems clear to Intervenors that the 1974 Feeder Plan and Construction Plan involve *all* of Dade County:

> ". . . it is obvious that a practice of concentrating Negroes in certain schools by structuring attendance zones or designating 'feeder' schools on the basis of race has the reciprocal effect of keeping other nearby schools predominantly white. Similarly, the practice of building a school . . . to a certain size and in a certain location, 'with conscious knowledge that it would be a segregated school,' . . . has a substantial reciprocal effect on the racial composition of other nearby schools."
>
> *Keyes, supra*, 37 L.Ed.2d at 559

It is, of course, undisputed that the Feeder and Construction Plans involve deliberate and intentional School

Board actions. Although the issue of the School Board's policies and actions as "purposefully segregative" and discriminatory or as "neighborhood school policy" remains hotly disputed (cf. *Keyes, supra*, 37 L.Ed.2d at 565), Intervenors deem the record to date conclusive as to purposeful and intentional discrimination. Intervenors also expect to present additional supporting evidence at the later hearing on the Construction Plan.

Only when the nature and extent of the constitutional violations encompassed by the 1974 Feeder Plan and 1974 Construction Plan are finally determined by the Courts (on the within Petition to this Court and the District Court's subsequent Construction Plan hearing, ruling, etc.) can the proper remedy be assessed.

CONCLUSION

Petitioners respectfully submit that the 1974 Feeder Plan, which seeks to permanently create an all-black school ghetto so that some 3,600 inner-city children will never see a white classmate for the thirteen years of their most impressionable, educable years from kindergarten through twelfth grade, must be struck down. It is further respectfully submitted that this Court should grant certiorari with directions to either permanently enjoin implementation of such Feeder Plan and to require adoption of a comprehensive desegregation plan for the 1975-1976 school year, or, in the alternative, to order full evidentiary hearings on the Feeder Plan and proposed full desegregation plans in the District Court.

Respectfully submitted,

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APPENDIX

APPENDIX

OPINION OF COURT OF APPEALS
(February 28, 1975)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 74-3181

(Filed, February 28, 1975)

HERBERT PATE, ET AL.,
Plaintiffs,

versus

DADE COUNTY SCHOOL BOARD, ET AL.,
Defendants-Appellees,

ALICE LOVE, CARSWELL WASHINGTON, ET AL.,
Intervenors-Appellants,

DADE COUNTY CLASSROOM TEACHERS' ASSOCIATION, INC.
Intervenor.

Appeal from the United States District Court
for the Southern District of Florida

(February 28, 1975)

Before BROWN, Chief Judge, MORGAN and GEE, Circuit Judges.

PER CURIAM:

This case began in August, 1969, when the Dade County School Board invoked the jurisdiction of the federal court to protect itself against an action in the Florida state court by a citizen who sought to enjoin the school board from implementing a desegregation plan it had approved for the 1969-1970 school year. After extensive proceedings over a period of a year, this court in a lengthy opinion reviewed the district court's orders approving a final desegregation plan after requiring further modification to the student assignment element of the plan and thereafter held that the total plan as modified would effectively desegregate the Dade County School System. Pate v. Dade County School Board, 434 F.2d 1151 (5th Cir. 1970), cert. denied 402 U.S. 953 (1971).

After the decision in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) and its companion cases, the district court entered an order on June 14, 1971, outlining the continuing duty of the Dade County School Board to make the desegregation plan work, recognizing its own responsibility to insure that the school system remained unitary, and giving all parties time to object to the school board's 1971-1972 pupil assignment plan. Thereafter, on June 18, 1971, the district court approved the plan and relieved the school board of any duty to obtain prior approval of further changes, and fixed the burden as to any further proceedings as follows:

> "The burden shall be upon the present intervenors, or any other persons hereafter permitted to intervene, to demonstrate to this Court a prima facie case of the School Board's failure to act in accordance with the principles outlined in this

Court's order of June 14, 1971. Jurisdiction is retained for this limited purpose."

At that time, the present appellants not only objected to the 1971-1972 pupil assignment plan, but moved to reopen the case for evidentiary hearings de novo, asserting that the desegregation plan as previously approved by this court was in conflict with the Supreme Court's decision in Swann v. Charlotte-Mecklenburg Board of Education, supra. On June 30, 1971, the district court denied further evidentiary hearings and found that the Dade County School System was a unitary system and complied with Swann v. Charlotte-Mecklenburg Board of Education, supra. The appellants appealed to this court from the district court's orders of June 18 and June 30, 1971, and this court summarily affirmed the district court. Pate v. Dade County School Board, 447 F.2d 150 (5th Cir. 1971), cert. denied 405 U.S. 1064, 92 S.Ct. 1493 (1972).

The record shows that the Dade County School Board has taken effective steps to further the desegregation process. When the board, in 1972, found that the pairings of two junior high schools which had been ordered by this court in its 1970 opinion had not worked effectively, the board grouped a third, virtually all white, school to the originally paired schools in an effort to stabilize the situation. This grouping, which involved additional bus transportation, voluntarily ordered by the board, was very recently before this court, and we approved the board's actions by affirming the dismissal by the district court of a complaint filed by a group of parents. Darville v. Dade County School Board, 497 F.2d 1002 (5th Cir., 1974).

The current proceedings here were initiated on June 20, 1974. In their petition the intervenors in the court below demanded a plenary evidentiary hearing, asserting the hearing was necessary concerning a recent revision by the board of the student feeder plan for one senior high school and a tentative 5-year construction plan which had been approved by the board.

The board filed a motion to dismiss, and the intervenors filed a reply thereto. The district court heard a full and extensive argument which was supplemented by exchange of letters concerning aspects of the construction plan.

On June 30, the district court held that the petitioners had failed to make a prima facie showing under the burden defined in its orders of June 14 and 18, 1971, sufficient to justify action with respect to the high school feeder plan or the demand for consideration of a comprehensive new desegregation plan. The district court scheduled a hearing to consider whether the implementation of the construction plan would adversely affect the existing unitary system. The board has not cross appealed from the portion of the order scheduling a hearing on the construction plan, and since the tentative construction plan is to be the subject of an evidentiary hearing, this construction plan is not an issue in this appeal. The district court's denial of intervenors' claims (a) to enjoin implementation of the board's 1974 feeder plan, and (b) for the adoption of a comprehensive desegregation plan for the 1975-1976 school year is hereby

AFFIRMED.

OPINION OF DISTRICT COURT
(July 30, 1974)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. 69-1020-CIV-CA

ALICE LOVE, CARSWELL WASHINGTON, MARGARET WASHINGTON, & THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA, INC.

VS

DADE COUNTY SCHOOL BOARD, ET AL

ORDER ON INTERVENORS' PETITION TO IMPLEMENT AND ENFORCE THE COURT'S PREVIOUS ORDER

In its Order entered June 14, 1971, this Court stated:

> Once having disestablished the dual school system and eliminated racial discrimination through official action from the system, there remains vested in the authority of the Court only the responsibility to assure that the school system does not revert to a state-imposed dual school system. See, Swann v. Charlotte Mecklenburg Board of Education, 39 U.S.L.W. 4437 (U.S. April 20, 1971).

Jurisdiction was retained in the above order to assure that the Dade County School system "was continually maintained in a unitary manner."

After briefing and oral argument, the Intervenors were unable to demonstrate a prima facie showing of the

School Board's failure to act in accordance with the principles outlined in the order of June 14, 1971 with respect to the Intervenors' Petition (a) to enjoin implementation of the 1974 Feeder Plan and (b) for adoption of a comprehensive desegregation plan for the 1975-1976 school year. Accordingly, the Petition is denied as to such relief.

A hearing on whether implementation of the 1974 New Construction Plan, as now proposed, would adversely affect the unitary system heretofore attained is scheduled at 1:30 p.m., September 24, 1974 in Courtroom 323, United States Courthouse, 300 NE 1st Avenue, Miami, Florida. A pretrial stipulation shall be filed by counsel in accordance with Local Rule 14. A pretrial conference will be held at 1:30 p.m., September 20, 1974. Intervenors and the School Board may engage in such discovery as may be appropriate for such hearing.

Entered this 30th day of July, 1974.

/s/ C. Clyde Atkins

UNITED STATES DISTRICT JUDGE

cc: Irma Robbins Feder, Esq.
Richard Yale Feder, Esq.
James W. Mathews, Esq.
Maurice Rosen, Esq.
Alfred I. Hopkins, Esq.
Frank A. Howard, Esq.
Fred. Davant, Esq.
Tobias Simon, Esq.
Charles E. Miner, Esq.
Frank Magrath, Esq.

OPINION OF DISTRICT COURT
(August 6, 1974)

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

No. 69-1020-Civ-CA

ALICE LOVE, CARSWELL WASHINGTON, MARGARET WASHINGTON, and THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA, INC.,
Intervenors,

vs.

DADE COUNTY SCHOOL BOARD, et al.,
Defendants.

ORDER

The above matter coming on to be heard on the Motion of Intervenors for Certification as a Final Judgment of this Court's prior Order of July 30, 1974 as to enjoining Feeder Plan and adopting a comprehensive desegregation plan and for a stay of the pretrial and trial of the implementation of the 1974 New Construction Plan, as proposed, and Defendant, DADE COUNTY SCHOOL BOARD, having agreed to said Motions and the Court being aware that the July 30, 1974 Order denying relief to Intervenors as to (a) enjoining implementation of the 1974 Feeder Plan and (b) adopting a comprehensive desegregation plan for the 1975-1976 school year was in-

tended as a final judgment on said issues as there is no just reason for delay in entering a Final Judgment on said issues and there appearing sufficient reasons for a stay of the remaining issues pending the outcome of an appeal from this Court's Order and the Court being otherwise fully advised, it is:

ORDERED:

That the Order of this Court entered July 30, 1974 be and is hereby amended to reflect a Final Judgment be entered in favor of the Defendant and against Intervenors with respect to Intervenors' Petition (a) to enjoin implementation of the 1974 Feeder Plan and (b) for adoption of a comprehensive desegregation plan for the 1975-1976 school year and such Final Judgment be and the same is hereby entered, and it is further ordered,

That the hearings and pretrial of the remaining issue on implementation of the 1974 New Construction Plan, as proposed, be and is hereby stayed pending the appeal of the foregoing Final Judgment, and it is further ordered,

That in all other respects the Order of July 30, 1974 be and the same is hereby reaffirmed.

ENTERED, this 6th day of August, 1974.

/s/ C. Clyde Atkins

UNITED STATES DISTRICT COURT JUDGE

Copies furnished to:

IRMA ROBBINS FEDER, ESQ.
RICHARD YALE FEDER, ESQ.
JAMES W. MATTHEWS, ESQ.
FRANK HOWARD, ESQ.
TOBIAS SIMON, ESQ.
CHARLES MINER, ESQ.
FRED DAVANT, ESQ.
MAURICE ROSEN, ESQ.
ALFRED I. HOPKINS, ESQ.

INTERVENORS' SUPPLEMENTAL PETITION TO THE DISTRICT COURT
(Excerpts pp. 15-24, R. 84-93)

IV

DUAL SYSTEM

A. FAILURE OF COURT ORDERED PLAN

A comparison of the expected racial composition of numerous paired and grouped schools in the Court of Appeals' Opinion and the actual racial composition of such schools as of February 12, 1974 reveals that the Court's plan has not worked realistically and indeed in view of School Board inaction and action, is now hardly working at all.[13]

[13]The expected racial composition was computed by using attendance figures and percentages set forth or referred to in the Court of Appeals' Opinion, 434 F.2d 1151. The actual racial composition is based on the School Board's Report to this Court dated April 1, 1974.

Bunche Park (formerly 100% black), Parkview and Scott Lake (formerly 2% and 1% black) were expected each to become 39% black. Today Bunche Park is 56% black; Parkview and Scott Lake are 48% and 42% black.

Rainbow Park (formerly 100% black) was expected to become 43% black by pairing with (formerly 2% black) Opa Locka. Today Rainbow Park is 67% black; Opa Locka is 26% black.

Young (formerly 85% black) was expected to become 36% black by pairing with Westview (formerly 0% black). Today Young is 65% black and Westview is 62% black.

West Little River (formerly 92% black) and Broadmoor (formerly 1% black) were expected to become 47% black each. Today West Little River is 66% black and Broadmoor is 58% black.

Arcola Lake (formerly 89% black) and Blanton (formerly 13% black) were expected to become each about 53% black. Today Arcola Lake and Blanton are both 65% black.

Holmes Complex (formerly 100% black), Little River (formerly 35% black) and Edison Park (formerly 53% black were expected to become approximately 68% black. Today Holmes Complex is 98% black; Little River and Edison Park are 71% black.

Gladeview (formerly 98% black) was expected to become 40% black by pairing with Hialeah (formerly 0% black). Today Gladeview is 52% black and Hialeah, 29% black.

Lorah Park (formerly 100% black) and Curtiss (formerly 0% black) were expected to become approximately 56% black. Today Lorah Park is 81% black and Curtiss is 57% black.

Allapattah (formerly 99% black) and Santa Clara (formerly 25% black) were expected to become about 70% black. Today Allapattah is 82-83% black and Santa Clara is 64% black.

Douglas (formerly 99% black) was expected to become about 40% black by pairing with Riverside (formerly 1% black) or grouping with Riverside and Southside (formerly 2% black). Today Douglas is 72% black (Riverside and Southside are 32% black and 1% black respectively).

Bethune (formerly 97% black) was paired with Melrose (formerly 3% black) for an expected 49% black result. Today Bethune is 70% black; Melrose is 47% black.

Dunbar and Wheatly (formerly 93% black and 100% black) were expected to become approximately 55% black. Today Dunbar is 69% black and Wheatly is 61% black.

Tucker (formerly 100% black) was expected to become about 52% black by pairing with Dade (formerly 1% black) or grouping with Dade and Coconut Grove. Today Tucker is 80% black; Dade and Coconut Grove are 52% and 56% black.

Miami Jackson Senior High School (formerly 85% black) was expected to become about 60% black through

court-ordered strict adherence to its attendance zones and those of Miami Senior High. Today Miami Jackson is 85% black.

The above demonstrated resegregation pattern does not reflect any significant change in the black-white ratio of Dade County public school children: as of September 28, 1970, there were 59,900 black students and 179,318 white students for a grand total (K-12) of 239,218 and a 25% black/75% white ratio;[14] as of February 12, 1974, there are 64,188 black students and 179,883 white students for a grand total (K-12) of 244,071 and a 26% black/74% white ratio.[15]

The resegregation pattern does demonstrate the unrealistic nature of "partially desegregating" the sixth largest public school system in the country.

The Court of Appeals clearly sought to desegregate Dade County's all-black and virtually all-black schools by establishing about 40% black student bodies therein. For example, said Court's pairing and grouping alternatives for Douglas yielded an expected racial composition of approximately 40% black; the Court deemed such "a desirable racial composition" (434 F.2d 1151 at 1156). Similarly, said Court's pairing or grouping choices for B.T. Washington Junior High envisioned an expected 36% to 46% black student body; the Court stated that "the resulting racial composition is desirable" (434 F.2d 1151 at 1157). On the other hand, the Court of Appeals was not pleased with the 68% black expected racial composition figure for Holmes Complex, and noted "it is possible

[14]School Board Report to this Court dated December 4, 1970, p. 2.

[15]School Board Report to this Court dated April 1, 1974, p. 2.

that the board may devise a more desirable plan to desegregate Holmes Complex before the commencement of the 1970-1971 school year" (434 F.2d 1151 at 1155). In like vein, unsatisfied with the Allapattah 71% black expected racial composition figure, the Court of Appeals stated "it is possible that the board may devise a more desirable method of desegregating the Allapattah school before the commencement of 1970-1971 school year" (434 F.2d 1151 at 1156). (B. T. Washington, unlike most of the schools desegregated by Court-orders, has remained desegregated and is 38% black today; Allapattah, like most of the schools desegregated by Court-orders has resegregated and is now 82-83% black).[16]

Comparing desegregation in Dade County with desegregation in other urban Florida counties once again reveals how relatively little Dade has achieved. According to a recent Senate Report setting forth "Black-student isolation in large city school districts, ranked by percentage of black students in the district"[17] of the 9 Florida counties covered Dade ranked 9th in the percentage of

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[16]School Board Report to this Court dated April 1, 1974, pp. 17 and 14.

[17]Emerson, Haber and Dorsen's Political and Civil Rights in the United States, 1973 Supplement to Volume 2, pp. 111-116 at 114-115, quoting from "Select Committee on Equal Educational Opportunity", S. Rep. No. 92- , 92d Cong. 2d Sess. 102-104, 110-111, 114-117 (1972), Table 7-16.

black students attending 50 to 100% black public schools in 1971:

County	% black	50 to 100%		
	1971	1968	1970	1971
Hillsborough	19.5	81.7	76.6	2.2
Pinellas	16.3	78.3	54.5	5.2
Polk	22.1	67.3	27.5	20.1
Broward	23.3	85.5	47.9	21.3
Palm Beach	28.6	81.4	74.9	37.1
Orange	18.4	79.9	59.3	47.7
Escambia	28.4	77.5	58.7	57.6
Duval	31.1	87.4	74.4	64.0
Dade	25.7	87.6	78.3	77.0

The 80-100%, 90-100%, and 100% black school statistics do not yield much comfort. Dade ranked seventh in the middle category, eighth in the third, and once again, ninth in the first category:

County	80-100%			90-100%		100%		
	1968	1970	1971	1968	1970	1968	1970	1971
Hillsborough	77.4	62.8	.6	73.3	49.4	64.3	11.3	0
Pinnellas	73.2	20.9	0	72.1	20.0	25.9	4.8	0
Polk	66.7	12.1	11.7	66.7	11.4	66.7	0	0
Broward	79.7	41.1	8.0	79.7	39.2	68.9	15.8	2.3
Palm Beach	79.5	40.6	10.8	76.2	29.4	72.3	0	0
Orange	77.1	52.0	28.3	77.1	33.3	77.1	16.6	4.9
Escambia	71.3	16.6	15.2	70.0	3.8	70.0	0	0
Duval	87.4	57.5	38.2	87.4	54.9	76.7	37.0	23.0
Dade	82.0	53.1	53.2	80.7	41.9	48.6	12.3	12.9

Moreover, the percentage-black and number-of-students figures contained in the School Board's Report to this Court dated April 1, 1974 show that as of February 12, 1974 Dade County has 59.2% of its black public school students in 50-100% black schools, 27.0% in 80-100% black schools, 19.8% in 90-100% black schools and 15.7% in 100% black schools. Thus Dade in 1974 is far behind

many other Florida counties three years ago and, perhaps even more significant, the percentage of blacks in all-black Dade County schools has actually increased since 1971.

B. SCHOOL BOARD DISCRIMINATORY ACTION AND INACTION

Defendant School Board has consistently placed the burden of desegregation on the black community, closing black schools[18] or downgrading black Senior Highs to Junior Highs,[19] failing to construct schools so as to prevent additional segregation and/or resegregation,[20] and bussing large numbers of black secondary students from the inner-city to predominantly white schools but not vice-versa.[21] Such placing of the burden on the minority group is prohibited by law. See e.g. Cisneros v. Corpus Christi Independent School District, 5th Cir. 1972, 467 F.2d 142 at 153, cert. den. 413 U.S. 920; United States v. Texas Education Agency, 5th Cir. 1972, 467 F.2d 848 at 885; Stout v. Jefferson Board of Education, 5th Cir. 1973, 483 F.2d 84 at 86; Davis v. Board of School Commissioners of Mobile County, 5th Cir. 1973, 483 F.2d 1017 at 1021-1022; Bell v. West Point Municipal Separate School District, 5th Cir. 1971, 446 F.2d 1362; Lee v. Macon County Board

[18]See e.g. Dorsey Junior High

[19]See e.g. B. T. Washington and G. W. Carver

[20]Has one new school been constructed since 1970 which has a student body with a black/white ratio similar to that throughout the school system?

[21]For example: inner-city black students are bussed across Biscayne Bay to Fisher Junior High, Nautilus Junior High and Miami Beach Senior High on Miami Beach. No Miami Beach students are bussed to Drew Junior High or Miami Northwestern Senior High, both 100% black and both under capacity according to the 1974 Feeder Plan (pp. 27 and 29).

of Education, 5th Cir. 1971, 448 F.2d 746 at 753-754; Mims v. Duval County School Board, 5th Cir. 1971, 447 F.2d 1330 at 1331-1332.

Defendant School Board has disregarded the Court of Appeals' direction to "appraise the system in the light of actual conditions and experience and . . . make whatever changes are required to assure the maintenance of a unitary system" (434 F. 2d 1151 at 1158). Defendant School Board has ignored this Court's warnings in its June 14, 1971 and August 16, 1972 Orders to the effect that the Board's continued inaction in the face of threatened resegregation would yield an unconstitutional reestablishment of the dual school system. Defendant School Board has continually rejected the Bi-Racial/Tri-Ethnic Advisory Committee's 1972 conclusion that Dade County school desegregation was "degenerating" and that the "danger of resegregation" was inherent in sticking to the status quo because "[w]ithout full desegregation, the unitary status will remain in constant jeopardy."[22] Defendant, School Board has explicitly rejected the so-called "15-40" Plan prepared at its direction, has explicitly rejected the so-called "Phase II" proposals for some relatively minor increased desegregation, and has explicitly rejected any policy directed towards seeking countywide desegregation at any time in the future (see Sec. II, supra). Defendant School Board "abandoned" the prior Feeder Plan "found objectionable" by Intervenors and the Bi-Racial/Tri-Ethnic Advisory Committee, thus leading this Court to conclude that there was "no basis for conducting an evidentiary hearing" requested last spring by Intervenors (see this Court's Order dated March 27, 1973).

[22]June 1972 Report to this Court, pp. 1 and 13.

Defendant School Board, having deliberately and successfully avoided Court action last spring by a do-nothing policy in the face of the Committee's objections and Intervenors' Motion for Hearings on the proposed prior Feeder Plan, adopted the present Feeder Plan quickly and quietly . . . so quickly and quietly that (1) Intervors were unaware of the proposed plan until almost the day it was adopted, (2) the Advisory Committee "did not have an adequate opportunity to review the proposed changes",[23] and (3) several School Board members expressed their unfamiliarity with the plan, two of whom voted against adoption on the ground of insufficient time to study it. Thus, Defendant School Board's constant inaction over the past few years with respect to increasing desegregation and/or preventing resegregation recently culminated in two clearly unconstitutional affirmative actions, the 1974 Feeder Plan intentionally segregating a meaningful segment of the black public school population throughout their school life[24] and a 1974 Construction Plan intentionally enhancing segregation rather than desegregation.[25]

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[23]Report to this Court dated March 8, 1974, p. 3.

[24]"It is obvious that a practice of concentrating Negroes in certain schools by structuring attendance zones or designating 'feeder' schools on the basis of race has the reciprocal effect of keeping other nearby schools predominantly white." Keyes v. School District No. 1, 1973, 413 U.S. 189, 93 S.Ct. 2686, 37 L.Ed.2d 548 at 559 and see fn. 12 quoting with approval Judge Wisdom's opinion in United States v. Texas Education Agency, Cir. 1972, 467 F.2d 848 at 888 to the effect that "Infection at one school infects all schools." See also Cisneros v. Corpus Christi Independent School District, 5th Cir. 1972, 467 F.2d 142 at 146-147.

[25]Keyes, supra, at 559-560; Swann v. Charlotte-Mecklenburg Board of Education, 1971, 402 U.S. 1, at 20-21, 91 S.Ct. 1267, 28 L.Ed.2d 554; Davis v. Board of School Commissioners of Mobile County, 5th Cir. 1972, 483 F.2d 1017 at 1021-1022.

Defendant School Board's persistent excuse for failure to effectuate true desegregation has been the spectre of massive busing. At the present time however, less than one-sixth of the public school children bused in Dade County are bused specifically for desegregation purpose, i.e., under court-orders. While numerous formerly all-white or almost all-white schools have been desegregated as a matter of fact by extensive busing (purportedly required by Defendant School Board to alleviate overcrowding), little such busing, if any, has been undertaken to desegregate all-black or virtually all-black schools. It should be noted at this point that rejection of all elementary school busing as a means of effectuating desegregation was explicitly disapproved in United States v. Texas Education Agency, supra, at 874. See also Henry v. Clarksdale Municipal Separate School District, 5th Cir. 1973, 480 F.2d 583, 585.

Intervenors submit that the amount of actual desegregation of formerly all-white or almost all-white schools which has occurred in the past few years through the use of busing demonstrates as a matter of practical fact the feasibility of similar desegregation of presently all-black or almost all-black schools through the use of busing. Cf. Lee v. Macon County Board of Education 5th Cir. 1971, 448 F.2d 746 at 754-755 and Henry v. Clarksdale, supra. Such feasibility was not so demonstrated at the time of the Court of Appeals' controlling opinion herein and said opinion left many schools all or virtually all-black because said Court was presented with "no feasible method of desegregating these schools" (434 F.2d 115, at 1155, see also 1154-1158).